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BY FEDERAL EXPRESS

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MEMORANDUM

Following is a report on six pending or recently concluded lawsuits in which the industry has provided assistance to plaintiffs challenging state or local antitobacco laws or regulations. Also included is a report on the Stop Youth Addiction lawsuits in California. Finally, we seek to determine whether there is general interest in providing financial assistance to plaintiffs in three other lawsuits -- (1) a federal preemption/First Amendment challenge to Cincinnati's billboard advertising ban, (2) a state-law challenge to a recent increase in Washington state's cigarette excise tax and (3) the appellate defense of a state trial court's decision invalidating on state-law grounds a local cigarette tax in Berwyn, Illinois.

Pending and Recently Concluded Cases

1. California

SYA Cases. In the last several months, an organization called Stop Youth Addiction has sued over 1,100 retailers in and around San Francisco and Sacramento. Virtually identical lawsuits have been filed in seven counties -- Alameda, Sacramento, San Francisco, San Joaquin, San Mateo, Santa Clara and Yolo. It is our understanding that additional suits will be filed in Contra Costa and Marin Counties in the near future. SYA alleges that the defendants are selling tobacco products to minors in violation of state criminal law. SYA claims that this alleged conduct is actionable under California's Business and Professions Code, which allows civil suits by private attorneys general to enjoin unfair business practices.

SYA seems to have been established by its lawyer, Donald Driscoll, for the purpose of pursuing this litigation. Driscoll has offered to dismiss retailers who agree either (1) to pay SYA \$100 and promise not to sell tobacco products to minors, or (2) to stop selling tobacco products altogether. It is our understanding that a number of retailers are settling rather than bear the cost of defense. Driscoll's tactics have

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attracted the attention of the state bar association. He, in turn, has sued at least one of his critics for defamation.

The first of the SYA cases was filed in Yolo County against Southland. The Superior Court denied Southland's general demurrer in December but has stayed the case pending the Court of Appeal's disposition of Southland's petition for a peremptory writ. The defendants' general demurrers in the six other cases are scheduled for hearing in the next few weeks as follows: Sacramento, Jan. 17; Alameda, Jan. 18; Santa Clara, Jan. 19; San Joaquin, Jan. 20; San Francisco, Jan. 26; and San Mateo, Feb. 1.

The California Grocer's Association (CGA), whose law firm is handling these six cases, has asked the industry for financial assistance. CGA's position is that retailers should comply with the prohibition against sales to minors but that state law does not allow private attorney general actions such as those brought by Driscoll, and that Driscoll's suits are pernicious and set a dangerous precedent. The industry has agreed to contribute \$50,000 to CGA, which CGA's law firm estimates will be the cost of handling the demurrers and any writ proceedings in the six cases. A copy of CGA's notice to retailers dated January 9 announcing its decision to pay for the defense of these cases is enclosed.

2. Colorado

The industry has agreed to use funds left over from the Colorado tax initiative campaign to help the American Constitutional Law Foundation pursue its federal court case against Colorado Health Department officials for unlawfully using public funds, including federal ASSIST funds, to propagate the tax initiative. The estimated cost to the industry of moving forward with the case is \$80K. The defendants' motion to dismiss is pending, however, and it is possible that the case will proceed no further.

3. Maryland

Baltimore. The Fourth Circuit has tentatively scheduled oral argument in the Penn Advertising case, challenging Baltimore's billboard advertising ban, for the week of March 6. The court also has announced that the case will be heard in seriatim with the Anheuser-Busch case, challenging Baltimore's alcohol billboard advertising ban. The industry has not provided financial assistance to the plaintiff to date in the Penn Advertising case, but it is our understanding that the plaintiff will request such assistance if the case goes to the Supreme Court.

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4. Massachusetts

Holliston. On December 22, a Holliston retailer (DC and L Corp.) and the New England Wholesale Merchants Association (NEWMA) filed a lawsuit in the U.S. District Court for Massachusetts challenging the Holliston Board of Health's recently adopted regulations banning all outdoor and most point-of-sale tobacco advertising, sampling and discounting. The Board of Health has agreed to not to oppose entry of a temporary restraining order by District Judge Richard Stearns barring enforcement of the regulations for 90 days. A copy of the TRO, entered today, is enclosed. The Board will be given 60 days in which to notify the court whether it will defend the disputed regulations. If it elects to defend the regulations, the Board will be required to file a brief opposing summary judgment at the expiration of the 60-day period.

Millis. On January 11, the Millis Board of Health voted to repeal its regulations banning all outdoor and most point-of-sale tobacco advertising. As previously reported, the Board had agreed not to oppose a TRO, issued by Judge Stearns on November 22, barring enforcement of the regulations. Plaintiffs' counsel will move to dismiss the case as moot and seek attorneys' fees. The plaintiffs in this case were Kishan Corporation and the NEWMA.

I am enclosing the transcript of the November 22 hearing on the TRO motion in the Millis case. As you will note, Judge Stearns stated that it was his "tentative conclusion" that the challenged advertising regulations were preempted. He also indicated that he found the Second Circuit's decision in the Vango Media case more persuasive than the District Court's decision in the Penn Advertising case. I also am enclosing a story on the Holliston and Millis suits that appeared in the Boston Sunday Globe on January 8.

Westfield. The Westfield Board of Health has avoided a lawsuit for the time being. Following the filing of the Millis lawsuit, the Board suspended all of the anti-tobacco regulations that it had adopted in September, which were to have taken effect on January 1. The regulations included smoking restrictions and bans on vending machines, self-service displays, sampling and billboard advertising. The Millis and Holliston lawsuits seem to be discouraging action by other Boards of Health as well.

Four local outdoor advertising bans remain in effect in Massachusetts -- in the Town of Milford (eff. 11/1/93), the City of Holyoke (eff. 8/1/94), the Town of Dudley (eff. 8/3/94) and the Town of Canton (eff. 1/1/95). The Milford, Holyoke and Dudley bans are regulations adopted by local Boards of Health. The Canton ban is a town by-law. The Holyoke and Canton bans are limited to billboards, while the Milford and Dudley bans also prohibit other outdoor signage. We will be considering what steps might be taken to overturn these bans.

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5. Minnesota

Preston. On December 5, a Preston retailer (Mrs. Binh Chiglo) and the manager of her retail store in Preston filed suit in federal court challenging a local point of sale advertising ban. The city acknowledged receipt of the complaint on December 22 and has turned the matter over to the Municipal League's insurance defense firm. Plaintiffs have agreed to allow the city until the end of the month to file its answer or motion to dismiss, in exchange for an agreement by the city not to enforce the advertising ban against Mrs. Chiglo.

6. Washington

Puyallup. On November 29, a group of restaurant owners filed suit in the Superior Court for Pierce County challenging as preempted by state law a restaurant smoking ban adopted by the City of Puyallup, asserting other state and federal constitutional violations, and seeking damages and attorneys' fees. On December 19, the City Council rescinded the ban and signed a settlement agreement with the plaintiffs promising not to take further action on restaurant smoking absent an intervening change in state statutory or case law. The Superior Court dismissed the case on December 30.

New Cases**1. Illinois**

Berwyn. Last year, the Illinois Association of Tobacco & Candy Distributors successfully challenged a local cigarette excise tax imposed by the City of Berwyn in defiance of a 1993 state law prohibiting new local tobacco excise taxes. Sustaining the state law, which the city had maintained violated the state constitution, the Circuit Court for Cook County invalidated the local tax. The city's appeal has been briefed and is awaiting oral argument. Last summer, the Committee of Counsel authorized a contribution of \$16K to help pay the IATCD's legal fees at the trial level. The industry now has been asked to contribute approximately \$10K more to help defend the trial court's decision on appeal.

2. Ohio

Cincinnati. The outdoor advertisers are ready to challenge the Cincinnati billboard advertising ban if the tobacco industry pays a portion of the cost. The cost to the industry is likely to fall somewhere between \$25K-\$50K, depending on whether the court can decide the case on summary judgment. The industry's political advisors favor challenging the ban because a similar ban is likely to be proposed in Cleveland and will be harder to oppose if the Cincinnati ban has gone unchallenged, and because

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challenging the Cincinnati ban would help similar bans to be resisted elsewhere, particularly New York City. We propose that the cigarette manufacturers pay 5/6 of the industry contribution and that STC pay the other 1/6, and that the cigarette manufacturers divide their contribution on a market share basis.

3. Washington

Last November, the voters in Washington approved Referendum 43, which effectively raised the cigarette excise tax by 10.5 cents per pack and extended or imposed new excise taxes on beer, wine, spirits and pop syrup. The tax referendum was required to implement the funding provisions of a state statute (HB 2319) passed earlier in the year. After Referendum 43 passed, the Skamania County Superior Court dismissed a prosecution under a firearm-theft provision of the statute on the ground that the statute violated the state constitution's requirements that a statute embrace no more than one subject and that the statute's title express that subject.

Convenience store owners, fast food store operators and soft drink bottlers, among others, would like to bring a lawsuit to invalidate all of the taxes imposed by Referendum 43, on the ground that HB 2319 itself is invalid. We believe that the legal objection to HB 2319, while not insubstantial on the face of it, is something of a long shot in view of the pertinent case law. The industry's political advisors, however, believe that it is desirable to support the nontobacco interests that seek to challenge the taxes, and a successful challenge would benefit the industry. It is proposed that the cigarette manufacturers contribute one-half of the estimated \$32.5K cost of the suit, or approximately \$16K, on a market share basis.

* * *

I will call you to determine whether there is agreement to provide support in these cases.

David H. Remes

enclosures

cc: Mr. Bezanson
Mr. Decker
Messrs. Juchatz and Donahue
Mr. Parrish and Ms. Keane

Mr. Schlagenhauf (by hand)
Messrs. Stevens and Cherry
Mr. Verheij and Ms. Marren
Mr. Wahby (by hand)
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